89-1364

Supreme Court, U.S.
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No. 89-____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

JESSE RICHARDSON

Petitioner.

v.

CITY OF CHICAGO AND
UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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25pp

QUESTION PRESENTED FOR REVIEW

Did this Court, in its *per curiam* opinion in *Marino v. Ortiz*, 108 S.Ct. 586 (1986), reverse the rule recognized by Learned Hand in *West v. Radio-Keith-Orpheum Corp.*, 70 F.2d 621, 624 (2d Cir. 1934), and consistently applied thereafter, that persons who appear in proceedings to object to the adjudication of their rights may appeal from an adverse decision without the formal filing of a petition to intervene to appeal?

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No. 89-____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

JESSE RICHARDSON

Petitioner,

v.

CITY OF CHICAGO AND
UNITED STATES OF AMERICA,

Respondents.

Petitioner Jesse Richardson respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on November 20, 1989.

OPINIONS BELOW

The order of the district court entering the consent decree (Pet.App. 3-15) is unreported. The order of the court of appeals dismissing petitioner's appeal (Pet.App. 1-2) is unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254. The order of the court of appeals dismissing the appeal (Pet.App. 1-2) was entered on November 20, 1989.

RULE INVOLVED

This case involves Rule 3(c)of the Federal Rules of Appellate Procedure:

> The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed form; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

STATEMENT OF THE CASE

In 1976, the United States secured a judgment that the City of Chicago had violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000 in hiring and promoting minority males and females in its police department. Thereafter, the government sought "individual relief for the victims of the discriminatory practice." *Teamsters v. United States*, 431 U.S. 324, 361 (1977).

In 1988, the City and the government agreed on a formula for relief and entered into a consent decree (Pet.App. 3-15.) All victims of the discriminatory practices were provided with notice of the proposed distribution procedure and an opportunity to object to the distribution formula.

Under the consent decree, backpay for discrimination in promotions in 1972 and 1973 is limited to the nine persons who had taken the 1968 sergeant promotional test and who were promoted after taking the 1973 test, irrespective of their position on the 1968 test. Petitioner, who was the highest ranking black police officer on the 1968 test not to be promoted, objected to the decree because it excluded him from any monetary remedy for the City's past discrimination. After hearing from petitioner and other objectors, the district court entered the proposed decree. (Pet.App. 18.)

Without filing a formal petition to intervene to appeal, petitioner filed an otherwise timely notice of appeal. Respondents moved in the court of appeals to dismiss petitioner's appeal, arguing that under *Marino v. Ortiz*, 108 S.Ct. 586 (1986) petitioner's notice of appeal was a nullity because he had not formally sought to intervene. The Seventh Circuit granted this motion and dismissed the appeal. (Pet.App. 1.)

REASONS FOR GRANTING THE WRIT

-I-

Petitioner is an objector to a decree that resolved his claim to a monetary remedy for discrimination. Petitioner appeared in the district court in answer to the district court's notice to show cause why the settlement adjudicating his rights should not be approved.

Before the *per curiam* decision of this Court in *Marino v. Ortiz*, 108 S.Ct. 586 (1986), persons, like petitioner, who appeared to object to the adjudication of their rights were considered "de facto intervenors," or, in Learned Hand's phrase, "parties pro hace vice." *West v. Radio-Keith-Orpheum Corp.*, 70 F.2d 621, 624 (2d Cir. 1934).[1] Under this line of authority, the district court's invitation to petitioner and to others whose rights were being adjudicated by the proposed decree amounted to an "implied grant of leave to

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1. See, e.g., *Sarbaugh v. State of Illinois*, 552 F.2d 768, 772-73 (7th Cir. 1977); *International Marine Towing v. Southern Leasing Partners*, 722 F.2d 126 (5th Cir. 1987); *Martindell v. International Telephone and Telegraph Corp.*, 594 F.2d 291, 294 (2d Cir. 1978); *Smartt v. Coca Cola Bottling Corp.*, 337 F.2d 950 (6th Cir. 1964); *Kenny v. Quigg*, 820 F.2d 665, 667-68 (4th Cir. 1987); *Sales v. Marshall*, 873 F.2d 115, 121 (6th Cir. 1989).

intervene." *Smartt v. Coca Cola Bottling Corp.*, 337 F.2d 950, 951 (6th Cir. 1964). As the Seventh Circuit held in *Research Corp. v. Asgrow Seed Co.*, 425 F.2d 1059 (7th Cir. 1970),

> If a class member intervenes *or even appears in response to a notice pursuant to Fed.R.Civ.P. 23(e)* and objects to the dismissal or compromise . . . he has a right to appeal from an adverse final judgment. (emphasis supplied) (425 F.2d at 1060)

This doctrine of "implied intervention" is illustrated in the opinion of Justice (then Circuit Judge) Stevens in *Tryforos v. Icarian Development Co., S.A.*, 518 F.2d 1258 (7th Cir. 1975):

> The law is clear that a non-party shareholder who appears, pursuant to a Rule 23.1 notice to present objections, to a proposed dismissal or settlement of a derivative action may appeal an adverse decision even though he has not been formally made a party to the action. (518 F.2d at 1263 n.22.)

In *Marino v.Ortiz, supra*, described as "well settled" the "rule that only parties to a lawsuit, or those that properly become parties, may appeal." 108 S.Ct. at 587. This "rule," however, had never been applied to preclude an appeal by a person who, after having objected to entry of a consent decree adjudicating his rights, sought review of that decree. See *West v. Radio-Keith-Orpheum Corp., supra; Research Corp. v. Asgrow Seed Co., supra; Tryforos v. Icarian Development Co., S.A., supra*, and the cases cited at note 1, *ante*. The rule that was well settled and that was directly at issue in *Marino* involved non-parties whose rights had not been adjudicated in the district court proceedings. See, e.g., *United States v. LTV Corp.*, 746 F.2d 51 (D.C.Cir. 1984), where a corporation which had been permitted to comment on a proposed consent decree under the Antitrust Procedures

and Penalties Act, 15 U.S.C. §16(b)-(h) sought to appeal without first seeking to intervene. There, however, the final judgment did not adjudicate the rights of the objector, who remained free to prosecute a private antitrust suit. Similarly, in *Marino*, "[e]ven if the settlement were invalidated [the Marino group] . . . would not be entitled to promotion." *Hispanic Society v. New York City Police Department*, 806 F.2d 1147, 1153, *aff'd sub nom. Marino v. Ortiz*, 108 S.Ct. 586 (1988).

This Court's *per curiam* decision in *Marino v. Ortiz* should not be extended to require the mechanical filing of a petition to intervene after judgment by a de facto intervenor who seeks appellate review of an adjudication of his (or her) rights. Petitioner sought to appeal from an order excluding him from receiving a share of the backpay that the City of Chicago has agreed to pay to victims of its past discriminatory acts. *Marino v. Ortiz* should not be expanded to reverse the well settled rule that "parties pro hace vice" — who appear in proceedings to object to the adjudication of their rights — may appeal without the formal filing of a petition to intervene after judgment to appeal.

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari should be granted.

February, 1990

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 89-2395, 89-2494 and 89-2715

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CITY OF CHICAGO

APPEALS OF: LINDA L. NELSON, et al.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
Nos. 73 C 2080 **Prentice H. Marshall,** *Judge.*

[November 20, 1989]

HON. WILLIAM J. BAUER, Chief Judge
HON. WALTER J. CUMMINGS, Circuit Judge
HON. MICHAEL S. KANNE, Circuit Judge

This matter comes before the court for its consideration upon the following documents:

1. "MOTION TO DISMISS RICHARDSON APPEAL FOR WANT OF JURISDICTION" filed herein on October 20, 1989, by counsel for defendatns-appellees.

2. "APPELLANT RICHARDSON'S MEMORANDUM IN OPPOSITON TO MOTION TO DISMISS" filed herein on November 3, 1989, by counsel.

Jesse Richardson filed a notice of appeal from the district court's June 8, 1989 consent decree, but was not a party to the case below. Because Richardson did not intervene in the district court, he cannot now appeal. See *Marino v. Ortiz,*

108 S.Ct. 586 (1988) (per curiam). Therefore,

IT IS ORDERED that 89-2494 is DISMISSED.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
v. *No. 73 C 2080*

CITY OF CHICAGO ET AL.
Defendants.

CONSENT DECREE IN FINAL RESOLUTION OF BACK PAY AND REMEDIAL SENIORITY ISSUES

In its Memorandum Decision of January 5, 1976, the Court held that the defendants, City of Chicago, et al. (City), had engaged in a pattern or practice of hiring and promoting within the City's Police Department which unlawfully discriminated on the basis of race, national origin and sex in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000, et seq., and that awards for losses in earnings and adjustments in seniority dates and benefits derived therefrom were appropriate for the victims of the City's unlawful conduct. *United States* v. *City of Chicago*, 411 F. Supp. 218, 243 (1976).

The United States and the City, through their attorneys, have conferred and agreed to the resolution of all issues concerning the identity of victims, the methods for determining the amounts of compensation to be tendered to them, and the seniority date and benefit adjustments to be recognized, which resolutions are contained in this Consent Decree. The Court has been advised and accepts that it is the intent of the parties in reaching these resolutions to remove all uncertainty as to these issues and to forego the necessity and expense of Stage II litigation or any other further proceedings before the Court concerning these aspects of this case.

The Court finds that the following provisions in resolution of all issues raised by its Memorandum Decision of January 5, 1976 concerning compensation for losses in earnings, and the issues of appropriate seniority and benefit adjustments related thereto, are consistent with the remedial purposes of Title VII of the Civil Rights Act of 1964, as amended, and represent fair and appropriate resolutions and compromises of all claims and assertions which either party may have preserved. Accordingly, the Court hereby adopts and approves the entry of this Consent Decree and, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. ESTABLISHMENT OF BACK PAY FUND: Upon the entry of this Decree, the City shall take appropriate accounting measures to establish an interest-bearing Back Pay Fund in the amount of $9,229,212.00, with interest to be deposited thereto at the rate of 6% or the highest rate at which any funds of the City on deposit with a financial institution earn interest, whichever is higher, compounded daily. This Back Pay Fund shall remain under the control of the City until the principal and interest earned thereon are distributed in accordance with the procedures for disbursements of awards for lost compensation provided for herein. If, two years after the Court's approval of the accounting called for by paragraph 10, there remain any funds which have not been and cannot be distributed, those funds shall revert to the City.

2. ADMINISTRATION OF FUND: The City shall bear the responsibility and costs of all bookkeeping and accounting tasks necessary to accomplish the disbursement of awards for lost compensation. With respect to every individual designated by this Decree as a recipient of a tender of

such an award, and all others who may subsequently be determined in accordance with the procedures provided for herein to be entitled to tenders of awards, the City shall calculate all appropriate federal, state and local income taxes, employee contributions to pension plans, and any other employee contributions required or permitted by law. These amounts shall be deducted from the gross amount due each individual designated or otherwise determined to receive a tender of an award, and such amounts shall be paid by the City from the Back Pay Fund established pursuant to paragraph 1 above to the appropriate government or other agency upon the acceptance by an individual of the award tender made to him or her. All employer contributions to pension funds, workers' compensation programs, or other funds or accounts required by law, shall be paid by the City upon the acceptance of a tender of an award, and such amounts shall not be set off from the individual awards nor in any other way paid from the Back Pay Fund established pursuant to paragraph 1 above.

3. AWARD RECIPIENTS: Attached hereto as Appendices A-D are lists of the persons whom the United States and the City agree are entitled to tenders of awards of compensation for lost earnings and adjustments in their seniority dates and all benefits derived therefrom. Appendices A-D are defined as follows:

Appendix A. Females on the 1972 policewomen eligibility list who were subsequently hired or reclassified as police officers and who successfully completed their probationary period, and females who were employed prior to March 24, 1972 as policewomen or matrons and subsequent to that date were reclassified as police officers.

Appendix B. Black and Hispanic males who applied for the 1968 or 1971 patrolman eligibility lists and were hired between March 24, 1972 and December 31, 1978 as patrolmen or police officers from those or subsequent lists, and who successfully completed their probationary period.

Appendix C. The first three females promoted to sergeant after March 24, 1972 who served as policewomen or matrons in or before 1968.

Appendix D. The first thirty-eight (38) Black and Hispanic males who applied for promotion to sergeant in 1968 and who were promoted to that rank between March 24, 1972 and December 31, 1973.

Appendices A through D exclude persons who waived an offer of hire or promotion, respectively, prior to March 24, 1972, and such persons are not eligible for an award under this consent Decree.

In each instance where an adjustment in a seniority date is to be accorded an individual, that individual's present seniority date and the adjusted seniority date in the classification involved are indicated. Also included on these lists are those female or minority male persons who applied for employment as police officers or for promotion to sergeant of police during the time periods set forth above, who were hired or promoted on the same date as they would have been expected to be hired or promoted in the absence of any unlawful employment practices, and who thus are not entitled to any awards for lost compensation or adjustments in their seniority dates.

4. PERSONS NOT LISTED: Persons who have not been identified on Appendices A-D, but who qualify for inclusion

in accordance with the following definitions, may file claims in accordance with the procedures set out in paragraph 5, below:

Appendix A. Females on the 1972 policewomen eligibility list who were subsequently hired or reclassified as police officers and who successfully completed their probationary period, and females who were employed prior to March 24, 1972 as policewomen or matrons and subsequent to that date were reclassified as police officers.

Appendix B. Black and Hispanic males who applied for the 1968 or 1971 patrolman eligibility lists and were hired between March 24, 1972 and December 31, 1978 as patrolmen or police officers from those or subsequent lists and who successfully completed their probationary period.

Appendix C. The first three females promoted to sergeant after March 24, 1972 who served as policewomen or matrons in or before 1968.

Appendix D. The first thirty-eight (38) Black and Hispanic males who applied for promotion to sergeant in 1968 and who were promoted to that rank between March 24, 1972 and December 31, 1973.

Appendices A through D exclude persons who waived an offer of hire or promotion, respectively, prior to March 24, 1972, and such persons are not eligible to be added to the respective appendices.

4a. In addition to persons not listed, any person listed on Appendices A through D, who believes that his or her seniority date as listed on the Appendix is incorrect, may file a claim in accordance with paragraph 5 below.

Should any error in Appendix A through D be determined and corrected to the detriment of any person listed thereon, that person shall be notified of the correction and, if he or she objects thereto, may file a claim pursuant to the provisions of Paragraph 5 below.

5. All persons who believe they qualify under the definitions set out in paragraph 4 or 4a above for a tender of an award for lost compensation and adjustments in seniority date and any benefits derived therefrom must file a claim with the City's Department of Personnel within ninety (90) days of the posting and publication of Notice pursuant to paragraph 6 below, or within thirty days (30) of receiving notice of a correction to an appendix pursuant to paragraph 4a, whichever is later.

6. To assure notice of these procedures and potential eligibility of persons not listed in Appendices A through D, the City shall undertake to give notice of this Consent Decree to all such persons by the following means:

a. The City shall post notices (Appendix E) and make available copies of this Consent Decree in every Police Department facility in the City of Chicago within seven days of the entry of this Decree;

b. The City shall publish notice of this Decree (Appendix F) once a week for two consecutive weeks in each daily newspaper of general circulation published with the Chicago, Illinois Standard Metropolitan Statistical Area; such notices are to be placed as display advertisements and not as "Legal Notices"; and in addition the City shall make efforts to obtain the broadest possible media coverage to assure notice of these procedures to affected persons;

c. The City shall use its best efforts to identify all black and Hispanic males who have been employed by the City as sworn or uniformed members of the Police Department between March 24, 1972 and December 31, 1978, and all females who have been so employed between March 24, 1972 and December 31, 1982, and who completed their probationary period and thereafter terminated their employment; and for the persons so identified who do not appear on Appendices A through D, the City shall mail a copy of the notice required by subparagraph 6(a) above together with a copy of this Consent Decree by certified mail, return receipt requested, to their last known address.

All such notices and mailings shall include a claim from (Appendix G), or shall advise where claim forms may be obtained, and shall include instructions for the execution of such claim form.

7. For any person who qualifies for consideration for a tender of an award for lost compensation by meeting a definition as provided in paragraph 4, a determination as to where on the appropriate Appendix attached hereto that person should be slotted shall be made in the same manner as made for those persons currently listed in that Appendix. That determination shall then govern as to whether or not that person is entitled to a tender of an award for lost compensation and an adjustment in seniority date and any benefit derived from that date.

8. In no event shall the slotting, pursuant to paragraph 7 above, or a person on an Appendix serve to disturb that Appendix or deprive any person currently listed therein of an award tender or adjustment in seniority date and benefits.

9. As soon as possible after the receipt of any claim for an award tender and adjustment of seniority date filed pursuant to paragraph 5 above, and before final determinations are made on such claims, the City shall review those claims and its proposed disposition of each with counsel for the United States. Should any disagreements or dispute concerning such claims arise as between the City and the United States, counsel for both shall seek a resolution without resort to the Court. However, if such a resolution is not agreed to, either party may seek to have the matter resolved by the Court or for the appointment of a Special Master for that purpose. Should an Order of Reference appointing a Special Master be entered, all costs of such proceedings before the Special Master, including the master's fees allowed by the Court, shall be borne exclusively by the City.

10. ACCOUNTING OF CLAIMS: As soon as possible after the ninety day period described in paragraph 5, the City shall perform an accounting of the valid claims filed by persons seeking to qualify under paragraph 4 above for awards for lost compensation and shall apply the formulas required by paragraphs 11 and 12 below. The names of persons with valid claims shall be added to Appendices A through D in the manner described in paragraphs 7 and 8 above to establish proposed Final Appendices A through D. The City shall notify by first class mail all persons whose claims have been rejected of their right to file an objection with the Court within ten days. The City shall then file with the Court the proposed Final Appendices A through D, indicating the amount of compensation due to each individual, together with a statement that persons whose claims have been rejected have been notified in accordance with this paragraph. Within twenty days from the date of the submission

to the Court of the Final Appendices A through D, the City and the United States shall file a joint motion for a hearing on any objection filed, including any objection which may be filed by the United States. If no objection is filed, or upon the resolution of any objections by the Court and recalculation of back pay amounts, and upon the filing under paragraph 17 below of the resulting amendments, if any, to Appendices A through D, the Court shall enter an order approving the Final Appendices A through D and authorizing the distribution of funds under paragraph 13 below.

11. CALCULATION OF BACK PAY AWARDS: For persons listed in and added to Appendices A and B, the amount of each award shall be determined by a formula which takes into account (1) the time which elapsed between when the person would have been hired in the absence of unlawful discrimination and the time that person was actually hired and (2) loss in earnings after hire due to delays in longevity raises and other related or normal increases in salary.

12. For persons listed in or added to Appendices C and D, the amount of each award shall be determined by a formula which takes into account (1) the relative actual loss in pay that resulted from the delay in promotion to sergeant from the time that the person would have been promoted in the absence of unlawful discrimination and the time that person was actually promoted, and (2) loss in earnings after promotion due to delays in longevity raises and other related or normal increases in salary.

13. Within sixty (60) days of the finalizing of the lists of recipients, the City shall prepare and send by certified mail, return receipt requested, award tenders to all persons named

in or added to Appendices A through D at their current or last known address. For persons who are currently employed by the City of Chicago, the City may, at its option, tender the award by separate check together with the recipients' regular pay. Each award tender shall include:

(a) a check in the amount determined by application of the formula described in paragraph 11 or 12;

(b) a notice in the form attached hereto as Appendix H describing this Consent Decree and explaining the time limit for acceptance of the award tender; and

(c) a release as described in paragraph 15, below.

14. AWARDS TO DECEASED PERSONS: Where an award for lost compensation is to be tendered to a person listed in or added to Appendices A-D, and that person is now deceased, the award shall be tendered to that person's surviving spouse if any. If there is no surviving spouse, the award shall be tendered to the estate of the deceased. The City shall have the responsibility and bear the costs and expense of locating and notifying all such surviving spouses or estates of any award tender.

15. RELEASE OF CLAIMS: Any award for lost compensation made pursuant to this Consent Decree shall be in full and complete settlement and satisfaction of any and all claims for lost compensation and other past benefits which the recipient of the award may have had for any denial or delay in hire or promotion resulting from any unlawfully discriminatory practice by the City, based on race, national origin, or sex, occurring prior to his or her actual date of hire or promotion. As a condition to the receipt of any award for lost compensation, the recipient shall be required to execute

a release in the form attached hereto as Appendix I which shall be printed on the back of the check tendered. Except where an award tender is made to a surviving spouse or the estate of a deceased, a person receiving an award tender for lost compensation shall have forty-five (45) days in which to accept the tender by endorsing and negotiating the check and thereby executing the release provided. A failure to accept an award tender within the time allowed shall constitute a rejection of that tender and release the City of any further obligation under this Consent Decree to make an award for lost compensation to that person. Surviving spouses and estates shall be allowed at least ninety (90) days to accept or reject an award tender and such additional time as may be necessary to effect a legal acceptance. The City and the United States shall use their best efforts to locate or otherwise determine the status of any person for whom initial efforts to make a tender are unsuccessful, and to provide any such person an opportunity to accept or reject the tender as described in this paragraph.

16. SENIORITY ADJUSTMENTS: Without regard to whether or not an award tender for lost compensation is accepted and a release executed, the adjustment in seniority date and benefits derived from that date to which any individual listed in Appendices A-D is entitled shall be made effective with the second pay period following the entry of this Consent Decree. For an individual determined pursuant to paragraphs 4 and 5 above to be entitled to an adjusted seniority date and benefits, such adjusted date and benefits shall be made effective with the second pay period following the accounting of all claims required by paragraph 10 above and the determination that the individual's claim to such relief is valid. Such adjusted seniority dates and benefits shall

thereafter be used or recognized by the City for all purposes for which such dates and benefits would otherwise be used, including for purposes of promotion, demotion and layoff, entitlement and amounts of longevity pay increases, and retirements and pensions.

17. REPORTING: (a) The City of Chicago shall at every stage of the implementation of this Consent Decree consult with counsel for the United States. The City shall keep said counsel apprised of the steps taken in accordance with the Decree and shall work with counsel as set forth above to implement all aspects of this Decree.

(b) Following the adjudication by the Court of any objections in accordance with paragraph 10 above, the City shall file a report to the Court setting forth the final accounting and proposed distribution of back pay.

(c) Following the distribution of all funds under this Decree, the City shall file with the Court a Final Report, identifying all awards tendered and accepted or rejected, and setting forth all efforts to locate any person named as a recipient of an award who did not receive an award tender.

18. RETENTION OF JURISDICTION: The Court shall retain jurisdiction over this Consent Decree along with all other matters in this cause for the purpose of entering any and all additional orders necessary and appropriate.

ENTERED this 7th day of June, 1989.

/s/ Prentice H. Marshall
UNITED STATES DISTRICT JUDGE

AGREED AND CONSENTED TO:

For the United States:
/s/ Robert T. Moore
Attorney

/s/ Cynthia Drabek
Attorney
Civil Rights Division
Department of Justice
Washington, D.C. 20530

For the City of Chicago, et al:
/s/ Judson H. Miner
Corporation Counsel

/s/ Peggy A. Davis
Assistant Corporation Counsel
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Supreme Court, U.S.
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CLERK

No. 89-1364

In the Supreme Court of the United States

OCTOBER TERM, 1989

JESSE RICHARDSON, PETITIONER

v.

CITY OF CHICAGO AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, under this Court's decision in *Marino* v. *Ortiz*, 484 U.S. 301 (1988), an individual who objects to entry of a consent decree but does not intervene in the lawsuit may appeal from the district court's order entering the decree.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the district court approving the consent decree (Pet. App. 3-15) is unreported. The order of the court of appeals dismissing petitioner's appeal (Pet. App. 1-2) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 20, 1989. The petition for a writ of certiorari was filed on February 20, 1990 (a Tuesday following a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner sought to appeal the entry of a consent decree in final resolution of backpay and remedial seniority issues in this suit brought by the United States against the City of Chicago under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The consent decree established an

interest-bearing back-pay fund of $9,229,212 to be distributed among four groups of persons adversely affected by the City's discriminatory employment practices. One such group was comprised of minority male incumbent patrolmen who applied for promotion to sergeant in 1968 and who were subsequently promoted by the City between March 24, 1972, and December 31, 1973. The decree also provided for adjustments in the seniority dates of those members of the affected groups whose hiring or promotion was delayed as a result of discrimination. Pet. App. 4-8.[1]

On June 5, 1989, the district court held a hearing on objections to the consent decree. C.A. Short App. 1-106. Petitioner, the highest ranking black police officer on the 1968 sergeants' eligibility list not to be promoted, filed written objections and appeared at the hearing as an objector. Pet. 3; C.A. Short App. 107-112. On June 7, 1989, the district court approved the decree. Pet. App. 3-15. It found that the settlement embodied by the decree is "fair, is based upon the record, is not arbitrary and capricious, and * * * serves the interests of those parties and persons for whom this litigation was brought and by whom it was defended." 6/7/89 Tr. 11.

Petitioner filed a timely notice of appeal from the June 7 order approving the consent decree. The United States filed a motion to dismiss petitioner's appeal for lack of jurisdiction, arguing that this Court's decision in *Marino* v. *Ortiz*, 484 U.S. 301, 303-304 (1988), precluded appeal by persons like petitioner, who were not parties to the lawsuit in the district court.[2] On that basis, the court of

[1] In addition, the decree provided a mechanism for persons not named in the decree but who believed they qualified for relief under it to file claims for inclusion. Pet. App. 6-7. Petitioner did not qualify for inclusion under this provision.

[2] After the United States moved in the court of appeals to dismiss petitioner's appeal, petitioner filed a motion in the district court for permission to intervene for purpose of appeal. That motion was denied on November 15, 1989, as untimely and is not at issue here.

appeals dismissed petitioner's appeal on November 20, 1989, in an unpublished. Pet. App. 1-2. DECISION

ARGUMENT

This Court's decision in *Marino* v. *Ortiz* is dispositive and required the dismissal of petitioner's appeal. Petitioner's attempt to distinguish his situation from that of the petitioners in *Marino* is unavailing. Accordingly, the petition presents no question warranting review by this Court.

1. In *Marino* v. *Ortiz*, white police officers appeared at a fairness hearing to object to the terms of a consent decree between minority officers and the City of New York settling a Title VII claim of discrimination in promotions. The white officers—who had not attempted to intervene either initially or for purpose of appeal—sought to appeal the district court's order approving the settlement. This Court rejected their appeal, stating that the "rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled." 484 U.S. at 304 (citing *United States ex rel. Louisiana* v. *Jack*, 244 U.S. 397, 402 (1917), and Fed. R. App. P. 3(c)).

In so ruling, this Court acknowledged the suggestion that exceptions may be possible to the general rule that only parties to an action can appeal a judgment. *Marino*, 484 U.S. at 304. Nevertheless, the Court determined that "the better practice is for such a nonparty to seek intervention for purposes of appeal." *Ibid.* Thus, the Court has already considered and rejected petitioner's argument (Pet. 6) that nonparties whose interests are affected by a district court judgment should not be required to go through the "mechanical filing of a petition to intervene" in order to appeal.

The rule confirmed by this Court in *Marino* is far preferable to that suggested by petitioner. Under petitioner's reasoning, every person filing an objection to a consent

decree in the district court is impliedly granted leave to intervene in the action, without meeting the criteria set out in Fed. R. Civ. P. 24, and without the original parties ever having an opportunity to address the propriety of intervention. In this case, petitioner's theory would result in the automatic granting of intervention to the more than 100 individuals who objected to the consent decree. Such a massive bypass of the intervention process would be unprecedented. The "better practice" recognized by this Court in *Marino* instead ensures that, before an individual may appeal from a judgment approving a consent decree and thus seek to upset a painstakingly negotiated agreement of the original parties to the litigation, he must at least satisfy the district court that he meets the criteria established by Rule 24. See *Hispanic Society of the New York City Police Dep't* v. *New York City Police Dep't*, 806 F.2d 1147, 1154 (2d Cir. 1986) (quoting *Bender* v. *Williamsport Area School District*, 475 U.S. 534, 548 n.9 (1986) (recognizing the importance of fulfilling the requirements for intervention)), aff'd *sub nom. Marino* v. *Ortiz*, 484 U.S. 301 (1988).

2. Even if this Court's opinion in *Marino* could be read as sanctioning some exceptions to the general rule that parties seeking to appeal must intervene below – and it cannot – petitioner can point to no putative exception that aids him. See Pet. 4-5. One set of cases in which appeals had been allowed before *Marino* "involve[d] appeals from orders which effectively bound a non-party despite its lack of party status in the trial court," *e.g.*, judgments in shareholder derivative suits and class actions in which shareholders and nonparty class members who have received notice of the pendency of the suits are bound. *United States* v. *LTV Corp.*, 746 F.2d 51, 53 (D.C. Cir. 1984). See, *e.g.*, *Tryforos* v. *Icarian Development Co., S.A.*, 518 F.2d 1258, 1263 n.22 (7th Cir. 1975) (shareholder derivative action); *Research Corp.* v. *Asgrow Seed Co.*, 425 F.2d 1059, 1060 (7th Cir. 1970) (class action); see also *West* v. *Radio-Keith-Orpheum Corp.*, 70 F.2d 621, 624 (2d Cir. 1934) (un-

secured creditor of corporation in receivership allowed to appeal judgment granting receiver's petition concerning corporation's assets, because receiver had made creditors "parties pro hac vice in order to protect itself" and creditors were bound by judgment). In this litigation, however, there was no certified class of which petitioner was a member nor is there any unusual circumstance which causes him to be bound by the judgment.[3]

In a second set of cases, the courts (again before *Marino*) have allowed appeals by litigants effectively treated as parties below. Thus, in *Smartt* v. *Coca-Cola Bottling Co.*, 337 F.2d 950, 951 (6th Cir. 1964), the appellants *had* moved to intervene in the district court; the district court simply never ruled on the motion. The district court, however, had considered and decided on the merits their motion to reconsider the dismissal of the lawsuit. The court of appeals determined that the district court had thus issued "an implied grant of leave to intervene." See also *Martindell* v. *International Tel. & Tel. Corp.*, 594 F.2d 291, 294 (2d Cir. 1979) (defendant waived objections to de facto grant of intervention by the district court by failing to raise them below); *Illinois* v. *Sarbaugh*, 552 F.2d 768, 772-773 (7th Cir. 1977)

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[3] In any event, despite petitioner's reliance on *Tryforos* and *Asgrow Seed Co.*, the Seventh Circuit dismissed his appeal on the basis of this Court's decision in *Marino*. Even if petitioner could claim an intracircuit conflict (a difficult claim given the different facts of the cases), that conflict would not merit this Court's review. *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

Analogously, we note that the Second Circuit does not consider the decision in *West* controlling on the right of appeal of objectors to settlement agreements. While it denied the City's motion for sanctions for prosecution of a frivolous appeal in *Hispanic Society*, 806 F.2d at 1154, it issued the warning that "any doubt as to the means by which objectors to class settlements should proceed in the future has been eliminated by this opinion."

(similar).[4] By contrast, this Court made clear in *Marino* that an objector to a consent decree who is allowed to present his or her concerns to the district court cannot thereby claim the status of a "party" to the litigation.[5]

Finally, in *Kenny* v. *Quigg*, 820 F.2d 665, 668 (4th Cir. 1987), the court of appeals allowed appeal under unique circumstances. The nonparty appellant had not only "participated significantly in the proceedings below, and had a substantial interest in the outcome of those proceedings," she had also dismissed her counterclaim in another suit in reliance on a fiduciary's compliance with a consent order entered in the suit below. Kenny was permitted to appeal even though she had not formally moved to intervene, when the Secretary of Labor in that suit failed to appeal the district court's order that the fiduciary had discharged its duties. Petitioner presents no such compelling circumstances to support his claim for treatment as a party, even assuming *arguendo* that *Kenny* remains good law in the wake of *Marino*.

3. Petitioner's suggestion that his situation can be distinguished from *Marino* based on the alternative holding of the court of appeals in that case is without merit. This Court's decision did not address that holding – that the non-

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[4] In a like vein, the court of appeals in *International Marine Towing* v. *Southern Leasing Partners*, 722 F.2d 126, 129 (5th Cir. 1983), refused to dismiss an appeal by a nonparty in light of the district court's implicit allowance of intervention (by treating a nonparty as a party) and its own past leniency in allowing appeals in such situations. The court "stress[ed]," however, that "future litigants should not rely upon this decision as a means to circumvent the clear requirements of [Rule 24]." *Ibid.*

[5] Petitioner's reliance (Pet. 4 n.1) on *Sales* v. *Marshall*, 873 F.2d 115, 121 (6th Cir. 1989), is misplaced. The court of appeals ruled there that the nonparty appellant could not rely on the concept of de facto intervention where the district court had "categorically denied intervention" and had never treated appellant as a party.

party appellants were not aggrieved by the settlement because they would not be entitled to promotion even if the settlement were overturned (see *Hispanic Society*, 806 F.2d at 1152) – nor did the decision turn in any way on the merits of the white policemen's arguments. Rather, this Court held that they had no right to appeal under Fed. R. App. P. 3(c), because they had failed to take steps to become proper parties to the lawsuit (*Marino*, 484 U.S. Ct. at 304); that holding precludes petitioner's appeal here.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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